No. 7239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK-ALASKA GOLD DREDGING COMPANY (a corporation),

Appellant,

vs.

LESTER B. WALBRIDGE,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Citations

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee petitions this court for a rehearing of this cause—with especial reference to the concluding sentence of the opinion, viz, "Judgment reversed and new trial ordered." The prayer of this petition is that this court will so modify its decision herein as to direct that the new trial shall be limited to a reconsideration of the question as to what, if any, sum is due to plaintiff as and for salary for the period from May 1, 1925, to January 5, 1928; and in that behalf appellee respectfully submits:

STATEMENT.

The only reversible error which this court found to exist was the action of the trial court in sustaining appellee's objection to the introduction of Appellant's Identification A and cognate matters—said Identification A being a letter dated March 21, 1925 (but really made on April 13, 1925), and bearing only on the question as to whether or not plaintiff (appellee) agreed that $3,600.00 of his annual salary of $7,200.00 for said period should be payable in monthly installments of $300.00 each and that the other $3,600.00 of the said $7,200.00 should not be due or payable until such time as the company was on a sound financial basis and paying dividends. It is appellee's contention that this error affected the consideration of only one issue of one (viz the 4th) of the four causes of action set out in the complaint.

The action was commenced April 25, 1928: the verdict of the jury was returned April 25, 1933: the judgment was rendered May 3, 1933. There were four causes of action but a "divisible" verdict and a "divisible judgment":

Cause of Action No. 1 is for recovery of $1,500.00 for money paid out and advanced at the special instance and request of defendant. On this cause of action the verdict of the jury was for plaintiff "for the sum of $1,500.00 with interest at the rate of 8% per annum from the 20th day of January 1922." (R. p. 46.) The interest from January 20, 1922 to April 25, 1933, (11 years 6 months 6 days) amounted to $1,352.00; and judgment was rendered for the total

of principal and interest, viz, $2,852.00. (R. pp. 71 to 76.) This cause of action was admitted by appellant. (Appellant's Brief p. 7, top.)

Cause of Action No. 2 is for recovery of $500.00 for money paid out and advanced at special instance and request of defendant. On this cause of action the verdict of the jury was for plaintiff for the sum of $500.00 with interest at the rate of 8% per annum from the 20th day of January, 1922 (R. p. 46). The interest from January 20, 1922 to April 25, 1933—(10 years 1 month 25 days) amounts to $406.11; and judgment was rendered for the total of principal and interest, viz, $906.11. (R. pp. 71 to 76.) This cause of action was admitted by appellant, (Appellant's Brief p. 7, top.)

Cause of Action No. 3 is for the recovery of $23.81 for money paid out and advanced at special instance and request of defendant. On this cause of action the verdict of the jury was for $23.81 and interest thereon at the rate of 8% per annum from December 31, 1922 (R. p. 46). The interest from December 31, 1922 to April 25, 1933 (10 years 3 months 25 days) amounts to $19.66; and judgment was rendered for the total of principal and interest, viz, $43.47. (R. pp. 71 to 76.) This cause of action was admitted by appellant. (Appellant's Brief p. 7, top.)

Cause of Action No. 4 is for salary alleged to be due for the *continuous* period March 21, 1922 to January 25, 1928 (pars. 2 and 3 Complaint R. p. 3), but the claims made in defendant's Second Amended

Answer, and the exigencies of the trial, made it convenient that this "continuous" period be "split up" into three lesser periods, and for the jury to find a verdict in relation to each of said lesser periods. This was done without objection. The three periods were (1) the year ending March 1st, 1924; (2) the 14 months ending April 20th, 1925; (3) the term commencing May 1, 1925 and ending January 5, 1928; and verdict was found as to each period separately (Verdict R. 46); and for this third period the verdict of the jury was for plaintiff in the sum of $7,731.98 and interest: and the judgment specifically shows that the total amount ($31,113.39) of the judgment on the fourth cause of action includes said sum of $7,731.98 and interest—the remainder of said judgment on the fourth cause of action, being allocated to the other salary periods.

These four causes of action (being separately stated) have the status and incidents of four separate and independent suits; they were kept separate at the trial —the verdict preserves that separation by specifying how much is found to be due on each separate cause of action—and the judgment is for a specific amount on each cause of action, as per the verdict of the jury. The amount of the judgment, then, is definitely and accurately divisible as among the four causes of action; *and further,* the sum adjudged to be due on the fourth cause of action is definitely and accurately divisible as between the sum awarded on account of that part of said fourth cause of action which might be affected by the error and the sum awarded on

account of that part of the fourth cause of action which is not affected by the error.

It is just, expedient and altogether proper to confine the new trial to a consideration of that error-infected part of the judgment, while the errorless part of the judgment is permitted to stand unimpaired.

THE RULE.

That in a proper case this course can be, and ought to be, pursued does not admit of doubt. At the trial of *21 Mining Co. v. Original Sixteen to One Mining Co.,* reported at 254 Fed. 630, the trial judge, Hon. Frank H. Rudkin, confined the new trial to one issue alone; and on appeal to this court his action in so doing was approved. (265 Fed. 469.) The case of *Farrar v. Wheeler,* 145 Fed. 482, was one where the Appellate Court (Circuit Court of Appeals of the 1st Circuit) reversed a case and ordered a new trial of one issue alone; in the opinion on rehearing the matter is fully gone into, authorities are reviewed and reasons given (Report p. 486). In *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U. S. 494, 75 L. Ed. 1188, it was contended that the granting of a new trial upon a single issue violated the Seventh Amendment—but the Supreme Court denied the contention, and said:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law, upon one issue of fact, that requirement does not compel a new trial of that issue

even though another and separable issue must be tried again." (Page 499 of 283 U. S.)

See also:

May Department Stores v. Bell, 61 Fed. (2) 830.

The reasons are so obvious, the principle is so well established, and the practice is so often resorted to, that we forbear to make further citations.

APPLICATION TO CASE AT BAR.

Appellee contends that the case at bar is an eminently proper case for the application of the rule.

Taking up this court's opinion: The court states "We are concerned upon this appeal only with the claim for salary" (p. 2, 2nd par. printed opinion). This imports of course that if reversible error exists it must have occurred only in the trial of the 4th cause of action for that is the only cause of action which at all relates to salary; and so the court proceeds to the consideration of the trial of the 4th Cause of Action with the view of seeing what, if any, error there occurred.

(1) The first salary period (if we may so express it) which the court considers is that from March 1923 to March 1924; and as to it this court says:

> "The Company does not challenge the sufficiency of the evidence to justify the finding of the jury awarding appellee his salary at $600.00 per month for the period in question from March 1923 to March 1924 but does challenge certain instructions

given" and the refusal to give certain instructions asked for by appellant (Printed Opinion p. 4); and then the court disposes of the objection by saying that the instructions *given* were correct; and that the court *cannot consider* whether or not there was error in refusing to give instructions asked for by appellant—for the very sufficient reason that no asked for instructions are included in the Bill of Exceptions. (p. 4 of Printed Opinion.) No error there.

(2) The court next proceeds to a consideration of the period March 1, 1924 to April 30, 1925 (p. 5 of Printed Opinion). The errors alleged and the decision of the court thereon were as follows, viz.:

> Appellant claimed that the trial court erred in sustaining appellant's objection to a question propounded to appellee on cross-examination as to whether or not he had made the statement that on account of his stock interest he was willing to go to Alaska without salary?

As to this, this court said that it was error; but refused to hold that it was prejudicial error (p. 7 of Printed Opinion). Appellee, at pages 46 and 47 of his brief strenuously maintained that the sustaining of the said objection was not prejudicial error, and he persists in that contention—here reiterating the citation of a decision by this court—which citation appears on page 47 of Appellee's brief, and is as follows, viz.:

> "Error in excluding cross-examination as to whether witness did not make a certain statement contradictory of his testimony, in the presence of persons named, held not prejudicial, where such

persons subsequently testified that the witness did make the statement."

Jackson v. U. S. (C. C. A. Wash.), 266 F. 770 (9th Cir.), certiorari denied, 254 U. S. 649, 65 L. Ed. 456.

We think it is apparent that this court *would not have reversed the case for any such error;* and as a matter of fact it was not on account of that error that the judgment was reversed. No reversible error there.

(3) The third alleged error which the court considered was the claim of appellant that the trial court should not have admitted the letter of April 11, 1924 (p. 8 of Printed Opinion).

This court very effectively disposed of this objection by saying:

> "This argument misconceives the purpose for which the letter was introduced * * * This letter therefore could not have the impeaching effect claimed by the company. Moreover the letter is dated a year prior to the formation of the contingent salary agreement to which Dillon testified and therefore could not have had any effect with reference to that agreement." (pp. 8, 9 of printed Opinion.) No error there.

(4) "We turn now" says the court "to a consideration of the controversy over the amount of salary to which appellee is entitled for the remaining period of his employment, namely, May 1, 1925 to January 5, 1928" (p. 9 of Printed Opinion). The context shows that this is to say "all other alleged errors have been de-

cided adversely to appellant, and there remains to be considered only one other question and that, in substance, is this, viz:

> Was it error for the trial court to rule out Plaintiffs' Identification A—being the offered letter dated March 21, 1925 (really written April 13, 1925) and relating only to the question as to whether or not plaintiff (appellee) agreed that $300.00 per month of his salary should not be payable "until such time as the company was on a sound financial basis and paying dividends".

This court then decides that it was reversible error to exclude that letter. *But, conceding the existence of the error, this question recurs,* viz: *"To what extent* does that error affect the judgment?" Does that error vitiate the entire judgment? or only that part of the judgment upon which the error has a bearing? Manifestly if that part of the judgment to which the error relates can be separated from that part of the judgment to which the error does not relate there is no necessity or call for a new trial of that part of judgment which is errorless. Now that error pertains only to the amount allowed by the jury as salary from May 1, 1925 to January 5, 1928 and interest. The amount which the jury allowed as salary for that period was $7,731.98. (Verdict R. 46). The interest to date of judgment (May 3, 1933) amounted to $3,092.80 and judgment was rendered for the total of said principal and interest viz, $10,824.98—said amount clearly appearing to be specifically, a part eo tanto of the amount allowed in the judgment for the Fourth Cause of Action.

Admit then that the letter should have been received: yet its effect would be only proof that a new contract had been entered into to operate for the remaining period of the employment i. e. from May 1, 1925 to January 5, 1928. In fact there is no claim that the new contract has any retroactive effect (see Sub. b of C of Second Amended Answer—Record p. 27).

There is no claim that the verdict is not supported by the evidence: there is no claim that the judgment is not in conformity with the verdict: there is no claim that appellant has not been allowed full credit for all payments and counterclaims which there was any evidence to establish: there is no claim that there is any error in the computations of the different items mentioned in the judgment as totalling the gross amount of the judgment on the fourth cause of action, viz. $31,113.39, "after deducting all credits due to defendants as aforesaid." (Judgment R. 75 top) The only reason then that a new trial is called for, is in order that it may be determined whether or not that item of the verdict which reads:

> "We further find that the defendant is indebted to the plaintiff for the term commencing April 30th, 1925 and ending January 5th, 1928 in the sum of $7,731.98 with interest at the rate of eight per cent per annum," (Verdict R. 46, 47)

is proper: and the only reason why that might not be proper is that the court erroneously excluded the letter (Plaintiff's Identification A). But even so, the amount allowed *in the judgment* for that item is the definitely ascertained sum of $10,824.98; and the judgment on the Fourth Cause of Action is erroneous only

in this viz that it is (possibly) too large by $10,824.98. If on a new trial of the issue as to the salary due for that period of employment, the verdict should be for defendant, the new judgment would differ from the present judgment in the fact only that the new judgment would be for $10,824.98 less than the present judgment.

CONCLUSION.

It will entail expense, annoyance and delay to retry *any* of the issues in this cause—expense, annoyance and delay which will be vastly augmented if instead of a retrial of only one of the issues there is to be a retrial of *all* the issues. And, too, an order for an "unlimited" new trial opens the entire case and affords opportunity for new pleadings, new issues, new arguments; changed positions, conceivably calling for the presence and testimony of additional witnesses who may not be procurable—thus augmenting the uncertainty and delay of legal proceedings.

AND WHY SHOULD THE ISSUES AS TO SALARY FOR PERIODS OF EMPLOYMENT NOT AFFECTED BY THE ERROR, BE TRIED AGAIN? HAVE THEY NOT BEEN TRIED ONCE—TRIED FULLY, FAIRLY AND WITHOUT ERROR? WHY SHOULD THE FIRST, SECOND OR THIRD CAUSES OF ACTION BE TRIED AGAIN? HAVE THEY NOT ALL BEEN TRIED ONCE —TRIED FULLY, FAIRLY AND WITHOUT ERROR?

The reasons for retrial of *only* those issues which are affected by error have never been more concisely expressed than by Chief Justice Rugg of the Supreme Court of Massachusetts, as follows:

> "The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus the parties and the commonwealth have been saved the expense, annoyance and delay of a retrial of issues once settled by a trial as to which no reversible error appears."
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> *Simmons v. Fish,* 210 Mass. 563, 77 N. E. 102, Ann. Cases 588, 590.

Wherefore appellee prays that this court will so modify its decision herein as to direct that the new trial shall be limited to a reconsideration of the question as to what, if any, sum is due to plaintiff as and for salary for the period from May 1, 1925 to January 5, 1928.

Dated, San Francisco,
April 29, 1935.

Respectfully submitted,
CHAS. E. TAYLOR,
JOHN L. MCGINN,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause, and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
April 29, 1935.

JOHN L. McGINN,
Attorney for Appellee and Petitioner.